United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

ORIGINAL

75-2119

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA ex rel. DOLLREE MAPP and ALAN LYONS,

Petitioners-Appellants,

-against-

WARDEN, NEW YORK STATE CORRECTIONAL INSTITUTION FOR WOMEN, BEDFORD HILLS, NEW YORK; and WARDEN, GREAT MEADOW CORRECTIONAL FACILITY, COMSTOCK, NEW YORK,

Respondents-Appellees.

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P/S

On appeal from the United States District Court for the Eastern District of New York

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BRIEF AND APPENDIX FOR PETITIONER-APPELLANT DOLLREE MAPP

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BRIEF FOR PETITIONER-APPELLANT DOLLREE MAPP

PRELIMINARY STATEMENT

This is an appeal from a denial of a petition for habeas corpus brought pursuant to 28 U.S.C. §2254. The petitioner, Dollree Mapp, was convicted after a jury trial in the Supreme Court of the State of New York, Queens County, of possession of more than sixteen ounces of heroin as was a co-defendant, co-petitioner Alan Lyons. Each of the petitioners was sentenced to a term in prison of twenty years to life.

The convictions were affirmed without opinion in the Appellate Division Second Department and the New York Court of Appeals denied leave to appeal.

Judge Bruchhausen below denied the petition for habeas corpus on the grounds that the five issues raised in the petition had been considered and ruled on correctly by the state court.[1] A certificate of probable cause was granted by this Court by Judges Mansfield and Van Graafeiland on July 22, 1975.

FACTS BELOW

No argument on the issue of the unsubstantiality of the evidence connecting the petitioner, Dollree Mapp, to the crime of criminal possession of sixteen ounces of heroin was made before the state appellate courts or in the court below. Nonetheless, such evidence was so slight as to be no evidence at all.[2]

Ms. Mapp was arrested on February 18, 1970 in her apartment at 118-46 Nashville Boulevard, Queens (2T440)[3]

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1. Judge Bruchhausen also denied a motion for reconsideration (A8-13) (Re reference see note 3 below).

2. Petitioner Mapp and her co-defendant, who was arrested out of the presence or vicinity of Ms. Mapp with 499 glassine envelopes of heroin in his pocket, were represented by two lawyers from the same law firm at trial and by the same lawyer on the appeals in the state court process. That same lawyer (Nancy Rosner) represented both petitioners before Judge Bruchhausen below.

3. References preceded by the letter "A" refer to pages of the appendix on appeal to the Appellate Division of the Supreme Court of the State of New York which was submitted to the District Court below and will be an Exhibit in this Court. References to the Transcript of the second state trial will be made by "2T" and page number; to the first trial by "1T" and page number.

A search warrant (the constitutional validity and application of which are challenged in this proceeding) was shown to Ms. Mapp and a thorough search was made of her and her apartment.

No narcotics were found on the person of Ms. Mapp or at the premises. No evidence was adduced of any narcotics of any kind in her physical possession at any time in these proceedings.

The finding of guilt was based on inferences only. The jury was permitted to infer, from (a) the finding of rent receipts made out to Bettie and Harold Smalls for Apartment 2R at 155-15 North Conduit Avenue, Queens, which receipts were found inside a drawer of Ms. Mapp's room when it was searched, and (b) on the basis of the identification testimony of two witnesses[4] who said that Ms. Mapp paid the rent for Mrs. Smalls, that somehow Ms. Mapp was "in possession" of a cache of heroin and narcotic paraphernalia seized in the Conduit Avenue apartment earlier on February 18, 1970. Possession

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4. One witness could not identify Ms. Mapp as the person who paid the rent at the time of this second trial (A184,173, 362-364); the other witness made an identification for the first time three years after the event (A380, 381, 386). The identification procedures were challenged below in the District Court as involving unconstitutional suggestibility (Br. below p. 31 Point IV). These techniques are not here challenged because it is contended that, even if Ms. Mapp were wrongfully or mistakenly identified as the person who paid the rent at the North Conduit premises, that identification was not sufficient as a matter of law to establish her dominion and control over the apartment, much less over heroin found in the apartment, or to establish her "possession" of such heroin.

was also imputed to Ms. Mapp of the 499 glassine envelopes of heroin found on co-defendant Alan Lyons at the time of his arrest in the hall outside the North Conduit Avenue apartment earlier in the morning of February 18, 1970.[5]

In this regard, the trial record exhibits two substantial items of evidence against any such inferences. Keys were seized in the search (to be challenged as illegal, infra) of the Nashville Boulevard apartment; no key to the North Conduit Avenue apartment was found among them (2T557) nor otherwise in the possession of the petitioner Mapp. Second, fingerprints were developed on the contraband items seized in the North Conduit Avenue apartment; no prints of petitioner Mapp were found on any of the items (A343).

Police officers testified that Ms. Mapp had been present in the North Conduit Avenue apartment with Mr. Lyons earlier that morning, but that she had left and that they did not arrest her. The officers did, however, arrest another woman whom they initially believed to be Ms. Mapp at the North Conduit Avenue premises (2T1119, 1120). It was only after they learned of their error that they proceeded to Ms. Mapp's home on Nashville Avenue to arrest her (2T481, 486).

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5. The heroin in the 499 glassine envelopes was estimated as two ounces, 118 grams; the amount of heroin found in the apartment was sixteen and three-quarter ounces (2T311, 326). Together the amounts found comprised the felony of possession of more than sixteen ounces of a narcotic substance (2T 1141).

Neither defendant took the witness stand[6] at the trial.

The Search Warrant and Affidavit

It will be shown infra that the affidavit in support of the search warrant did not meet the constitutional standards required by the Fourth Amendment. It was conceded at the suppression hearing which took place prior to the first trial of co-petitioners that no additional information to that appearing in the affidavit was submitted to Judge Joan O'Neill, the Criminal Court judge who signed the search warrant on February 13, 1970 (A9).

The affidavit in support of the search warrant read as follows:

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6. Both defendants had been convicted at a prior trial and their convictions had been reversed by the Appellate Division (People v. Mapp, 39 A.D.2d 539 (2nd Dept. 1972). Each of the defendants had taken the witness stand at the prior trial. Ms. Mapp testified at that trial that she knew Alan Lyons, knew him as a drug user (1T2676), and that he was an employee of hers at the Amsterdam Furniture Mart, of which she was the proprietor (1T2670, 2674). She testified, however, that she had never been in Apartment 2R at 155-15 North Conduit Blvd. although on two occasions only she had driven Lyons to the building (1T2682-2685). She categorically declared she was not near the North Conduit premises on February 18, 1970 with Lyons or otherwise (1T2686). The reversal had turned on improper prosecution cross-examination of the defendants. It is here submitted that it was to Ms. Mapp's interest to take the witness stand in the trial below but that it may not have been to the interest of co-petitioner Lyons. This was never explored as they were each represented by member lawyers of the same firm, Paul Goldberger and Barry Asness (Goldberger, Asness, Feldman & Breitbart) of 401 Broadway, New York, N. Y.

"(A) On October 6, 1969 a confidential informant who has not proven reliable in the past, told your deponent that Dollree Mapp, B #1478934 100, and Alan Lyons B #182475 #8359755 are packaging and selling narcotic drugs, to wit: heroin, and are processing and cutting and packaging such drugs in premises 155-15 North Conduit Avenue, Queens, New York, Apt. 2R. The confidential informant further states that Mapp and Lyons were storing such packaged drugs in premises 118-46 Nashville Blvd., Queens, New York, in the part of the house occupied by them (first floor and basement).

"(B) Said confidential informant further stated that on Feb. 1, 1970, Dollree Mapp told the informant that she and Alan Lyons were going to 'bag-up' all day and could be reached at telephone #723-1387. A check of the records of the New York Telephone Co. reveals that telephone #723-1387 is listed to one Harold Smalls Apt. 2R, 155-15 North Conduit Ave., Queens, New York. On Feb. 1, 1970, at approximately 8:15 A.M. your deponent followed Dollree Mapp and Alan Lyons from premises 118-46 Nashville Blvd., Queens, New York to premises 155-15 North Conduit Ave., Queens, New York, wherein both Mapp and Lyons entered Apt. 2R.

"(C) Said confidential informant further stated that on Feb. 5, 1970, Dollree Mapp told the confidential informant that she and Alan Lyons were going to 'bag-up' all day Sunday Feb. 8, 1970. On Feb. 8, 1970 your deponent, at approximately 8:20 A.M., followed Dollree Mapp and Alan Lyons from premises 118-46 Nashville Blvd., Queens, New York, to premises 155-15 North Conduit Avenue, Queens, New York. While inside said premises your deponent overheard Dollree Mapp say to Alan Lyons, 'We're going to have to bust our motherfucking asses to get this shit bagged up by tomorrow.' Mapp and Lyons then entered apt. 2R at which time your deponent left the premises.

"(D) On Feb. 9, 1970 your deponent showed a photograph of Dollree Mapp to the secretary of Mr. Rose, the sales and management agent of the building 155-15 North Conduit Ave., Queens, New York, and she identified Mapp as being the person who paid the rental fee for Apt. 2R, 155-15 North Conduit Ave., Queens, New York.

"(E) The confidential informant further stated that Dollree Mapp and Alan Lyons 'bag-up' heroin and

marijuana, at premises 118-46 Nashville Blvd., Queens, New York. On November 6, 1969 at approximately 8:00 P.M., Det. Sylvan Topel, Sh. #1828, New York City Police Dep't. Narcotics Division, Special Investigating Unit called telephone instrument number LA 7-2994 located at premises 118-46 Nashville Blvd., Queens, New York, and listed to Maudell Mapp and listened in while the aforementioned confidential informant spoke to Dollree Mapp. In the course of the conversation, Dollree Mapp indicated that she had a quantity of narcotics in her house at that time.

"(F) On January 13, 1970 at approximately 4:40 P.M. Alan Lyons sold a quantity of heroin to John Doe, a police officer for a sum of U.S. currency in New York County." (A6)

Key insufficiencies to be noted from reading of the above are:

(1) The unnamed confidential informer is specifically described as "not proven reliable in the past." (Par. A above)

(2) Allegations concerning the packaging and selling of drugs were not based on anyone's (including the unreliable informant) eyewitness observation of narcotics at any location.[7]

(3) Conclusory allegations asserting the packaging and selling of drugs at the two physical locations to be searched (155-15 North Conduit Ave., Queens, Apt. 2R and 118-46 Nashville Blvd., Queens) are not based on any alleged personal knowledge of the deponent or his unidentified informer, and were limited to October 6, 1969 and November 6, 1969, more than three months

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7. Thus the "personal observation" of the informer required by this Court in United States v. Viggiano, 433 F.2d 716, 719 (2 Cir. 1970) was lacking.

before the application for the search warrant (Par. E above).

(4) References to matters overheard by the police officer applying for the search warrant referred to the bagging up of "shit" and not narcotics (Par. C above).

(5) The stated sale of heroin by Lyons to an unknown police officer in Par. F does not reveal the source of the information, nor does it relate to petitioner Mapp.

Suppression Hearing in State Court

Although it will be contended that the information set forth in the affidavit requesting the search warrant was insufficient as a matter of law and nothing the officer stated at the suppression hearing could be construed constitutionally to augment that record, the testimony adduced at the suppression hearing and the trial raised further question as to the good faith of the entire prosecutorial proceeding.[8]

Examples of such inconsistencies are the following:

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8. Detective John Bergerson, the police officer in charge of the investigation and prosecution of co-petitioners, a member of Special Investigations Unit of the Police Department, was prosecuted and found guilty in a Police Department trial of accepting $3,500.00 taken illegally from a narcotics dealer in March 1968 and was dismissed from the police force. See The New York Times, July 8, 1974, p. 33 col. 2. He is currently named as an unindicted co-conspirator in an indictment for perjury, People v. Dominick Butera et al. Ind. No. 1246-75 Bronx County. The dismissal from the force and indictment of Detective Bergerson occurred after the conviction in the present case. Detective Wilson had taken early retirement from the police force before his testimony in this case.

(1) Detective Bergerson in his affidavit (Par. A) stated that the "not proven reliable" informer told him on October 6, 1969 that Dollree Mapp and Lyons were "processing and cutting and packaging" heroin at premises 155-15 North Conduit Ave., Queens, New York, Apt. 2R.

The People's witness, Joanna Martin, an agent of the owner of the building, stated that the first time the North Conduit Street apartment was occupied by anyone was in November 1969 (A361).[9]

(2) Detective Bergerson stated in the affidavit (Par. B) that the same "not proven reliable" informer had told him on February 1, 1970, that Dollree Mapp and Lyons were going to "bag-up" all day and could be reached at a telephone located at the North Conduit address. Bergerson said he then followed the two to that address and they both entered Apt. 2R.

At the hearing Bergerson could not recall whether he saw them enter 2R nor did he know in fact if they entered that apartment. He had followed them in an automobile to the premises (A42, 43). Moreover at the suppression hearing Bergerson

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9. In his summation the prosecutor argued to the jury that the first time any of the police knew about the 155-15 North Conduit Avenue premises was on January 6, 1970 when Ms. Mapp's red panel truck was followed to that address. This fact, if it were a fact, is directly at variance with the sworn allegations of Bergerson made for the purpose of securing a search warrant. (Par. A of the search warrant asserts that the North Conduit Avenue premises were used for the "cutting and packaging" of drugs on October 6, 1969.)

had no recollection whatsoever of this February 1, 1970 conversation with the informer and did not know whether or not it was true and he had lost whatever notes he had made (A37-39).

(3) Detective Bergerson stated in the affidavit (Par. C) that on February 5, 1970, Dollree Mapp told the "not proven reliable" informer that she and Lyons were going to "bag-up" all day Sunday, February 8, 1970. On February 8, 1970, Bergerson swore in the affidavit that he went to the North Conduit Avenue premises on February 8, 1970 and overheard Dollree Mapp say to Lyons "we're going to have to bust our mother-fucking asses to get this shit bagged up by tomorrow."

At the suppression hearing, Detective Bergerson remembered seeing the informer on February 4, 1970, the day before Ms. Mapp was supposed to have spoken to him (the informer), but Bergerson had no recollection whatsoever of speaking to the informer after February 4, 1970, on February 5, 6 or 8, even after looking at the affidavit to refresh his memory (A45-48). This raises a question as to even the existence of the informer or whether or not the informer ever gave Bergerson the information he swore in his affidavit had been given him by the informer.

ISSUES PRESENTED

(1) On the trial record as a whole, the conviction of Dollree Mapp involved a deprivation of due process of law since there was no substantial evidence, or any evidence, to

connect her to the commission of the crime of possession of more than sixteen ounces of a narcotic substance (heroin).[10]

(2) The affidavit in support of the search warrant (the only evidence before the issuing magistrate), based on unreliable hearsay and suspicion, only, was insufficient under the Fourth Amendment to supply probable cause for the issuance of the search warrant leading to the arrest of Dollree Mapp.

(3) Facts adduced at the suppression hearing establish perjurious and material inconsistencies on the part of the officer applying for the search warrant, invalidating the search warrant.

(4) Disclosure of the identity of the informer was

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10. This point was not argued below or in the state court appellate proceedings but the record, itself, before all the courts demonstrated the absence of any evidence of Ms. Mapp's guilt. An explanation for the omission of this point from the arguments before the state courts and the District Court can be found in the joint representation of Ms. Mapp and co-petitioner Lyons in all previous proceedings. The testimony at the trial was uncontroverted that Lyons had 499 glassine envelopes containing heroin on his person at the time of his arrest, and that he had just left an apartment (2R) where more than sixteen ounces of heroin were recovered in plain view along with narcotic paraphernalia. There is also no question that Ms. Mapp was some miles away from the Conduit Avenue address in her own home on Nashville Boulevard at the time of her arrest and that she had no narcotics on her person or in her home. See United States v. De Berry, 487 F.2d 448 (2 Cir. 1973) where the conflict of interest between defendants represented by the same attorney required a reversal of the convictions and a new trial for both defendants. On the issue of lawyers in the same law firm being bound by the rules applying to an individual attorney see Old Canon 6 of Canons of Ethics of the American Bar Association. Handelman v. Weiss 368 F. Supp. 258 (SDNY 1973); cf. Glasser v. United States, 315 U.S. 60, 76 (1942); People v. Sprinkler, 16 A.D.2d 818 (2d Dept. 1962); Johnson v. Zerbst, 304 U.S. 458 (1938).

required under standards of fairness set by the Supreme Court in Roviero v. United States.

POINT I

THE CONVICTION OF PETITIONER MAPP WAS PREDICATED ON NO EVIDENCE WHATSOEVER OF HER POSSESSION OF NARCOTICS IN VIOLATION OF STATE LAW; UNDER THESE CIRCUMSTANCES HER CONVICTION CONSTITUTED A VIOLATION OF DUE PROCESS OF LAW.

Penal Law §220.23 as it then read[11] provided:

"§220.33 Criminal possession of a dangerous drug in the first degree

"A person is guilty of criminal possession of a dangerous drug in the first degree when he knowingly and unlawfully possesses a narcotic drug consisting of one or more preparations, compounds, mixtures or substances of an aggregate weight of sixteen ounces or more containing any of the respective alkaloids or salts of heroin, morphine or cocaine, or containing raw or prepared opium.

"Criminal possession of a dangerous drug is a class A felony."

In order to convict Ms. Mapp, the prosecutor had the obligation of proving beyond a reasonable doubt that on February 18, 1970, Ms. Mapp "knowingly and unlawfully" possessed a narcotic drug, the aggregate weight of which was sixteen ounces or more. Despite the fact that Ms. Mapp was miles away in her own home at 118-46 Nashville Blvd., Queens, from the

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11. P.L. §220.23 was renumbered 220.33 in 1970 and was repealed in 1973.

locale on Conduit Avenue at the time and where the narcotics were found and tnat she was never seen by anyone in the vicinity of any narcotics, she was convicted of the class A felony and sentenced to twenty years to life in prison. Based on the trial record, the summations and the court's charge, her conviction was predicated on the theory that she was aiding and abetting Lyons and/or she was the legal occupier and/or tenant of the premises, Apartment 2R at 155-15 North Conduit Avenue, Queens, and in such role had "constructive" possession of the narcotics found in the Conduit Avenue apartment.

There was no evidence to support either of these theories adduced at trial; yet no argument was made to the trial court, on appeal or to the court below of what should have been obvious to court and counsel.[12]

Aiding and Abetting

Despite evidence of detailed surveillance of Ms. Mapp's and co-petitioner Lyons's activities by four police officers (bergerson, Fink, Wilson and Toppel) from some time early in January 1970, up to February 18, 1970, including the taking of

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12. Again it is to be recalled that the same law firm (Goldberger, Asness, Feldman and Breitbart, 401 Broadway, New York, N.Y.) and later on appeal the same lawyer represented the two defendants whose interests were in conflict since one person (Lyons) was arrested with 499 glassine envelopes just outside an apartment he had just left containing sixteen ounces of heroin and the other defendant (Mapp) was miles away at the time of Lyons's arrest.

motion pictures (2T510), evidence adduced bearing on Ms. Mapp's implication in Lyons's possession of narcotics consisted of two ambiguous statements allegedly overheard by Detective Bergerson. One, on February 8, 1970, was made in the North Conduit address hallway and was reported in the affidavit requesting a search warrant. Ms. Mapp said to Lyons, according to Bergerson,

> "We're going to have to bust our mother-fucking asses to get this shit bagged up by tomorrow." (2T107, 188)

The other statement also overheard by Detective Bergerson was allegedly made by Ms. Mapp about 9:00 A.M. on February 18, 1970, as she was leaving apartment 2R (forty minutes before Lyons was arrested in the same hallway); Ms. Mapp (if indeed she was there) was not arrested then even though she could have been stopped and searched as was Lyons later that morning. Bergerson testified that he heard Ms. Mapp say:

> "When you finish those bundles, bring them home" (2T111)

It is here submitted that neither of these statements attributed to Ms. Mapp established her being in <u>possession</u> of any narcotics. See <u>United States</u> v. <u>Jones</u>, 308 F.2nd 26 (2 Cir. 1962); <u>Montoya</u> v. <u>United States</u>, 402 F.2nd 847 (5 Cir. 1968); <u>United States</u> v. <u>Infanti</u>, 474 F.2nd 522 (2 Cir. 1973); <u>United States</u> v. <u>Stephenson</u>, 474 F.2nd 1353 (5 Cir. 1973). The first reference is specifically to "shit", a substance which requires no definition here, but which this Court can note is <u>not</u> heroin.

The second is to bundles which is sufficiently indefinite as to mean bundles of anything and, without more, cannot be construed to mean heroin. There was no testimony -- expert or otherwise -- that bundles had any special meaning in this context. And even if she were discussing narcotics, such discussion does not establish her dominion and control over them to constitute the crime of felony possession.

Constructive Possession

Rent receipts made out to a Bettie and Harold Smalls found in a bedroom drawer of Ms. Mapp in a search pursuant to a warrant[13] for narcotics were introduced in evidence in an attempt by the prosecution to establish that Ms. Mapp was Mrs. Smalls, the lessee of Apt. 2R at North Conduit Avenue. Despite the apparent existence of a lease (2T750), no effort was made by the prosecutor to establish that Ms. Mapp ever signed such a lease as Mrs. Smalls. Under these circumstances the prosecution had the obligation of showing that Ms. Mapp was Mrs. Smalls, as it was contended, by showing she had signed the lease or by some other proof. No such proof was offered and accordingly the opposite inference must be made -- that Ms. Mapp was not Mrs. Smalls. See II Wigmore 3rd ed. ¶285 p. 162. In addition,

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13. The invalidity of the warrant (Point II) and therefore the inappropriateness of the admission in evidence of the rent receipts will be argued infra.

there was inconclusive evidence introduced at the trial to show that some sort of a credit investigation was made into Mr. Smalls's background and credit (2T728-731). The investigator stated that he had never seen Ms. Mapp before (2T731).

Neither of the two identification witnesses (Joanna Martin or Dorothy Weiss), who stated that they remembered a woman coming to the rental office on several occasions to pay the rent for apartment 2R, ever said that Ms. Mapp said she was Mrs. Smalls, nor did they identify her as Bettie Smalls. They recognized the person who paid the rent on those several occasions as Ms. Mapp.[14] (2T748, 750, 751 [Ex. 22], 756, 926, 929, 930)

The fact that Ms. Mapp was never identified as Mrs. Smalls by anyone was somehow never remarked upon by court or defense counsel. Instead in briefs to the state court and to the court below, defense counsel misled the court:

> "Martin identified petitioner as <u>the Mrs. Smalls</u> who paid the rent on apartment 2R at 155-15 North Conduit Avenue (A 165)" [Br. below p. 32] (emphasis supplied)

The record at p. A165 reads:

> "Q [to Mrs. Martin] And you recognized the person in the photograph?
>
> "A Yes.
>
> "Q And that was the person that paid the rent to you on three occasions that you testified to?

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14. Mrs. Martin, in fact, did not testify that Ms. Mapp was the person who paid the rent -- only that she had identified her at a prior trial as such person (2T756).

"A Right."[15]

The jury was asked to make an inference that evidence of the payment of rent on several occasions by Ms. Mapp on the Conduit Avenue premises established her as the Mrs. Smalls who rented the apartment even though there was no evidence of any kind adduced that Ms. Mapp had leased the apartment. If she were the person who paid the rent, there are many other inferences which can just as reasonably be drawn -- that Mrs. or Mr. Smalls had asked her to do so, had hired her to do so or, for whatever reason, she was paying the rent for them.[16]

Nor would the finding of the rent receipts inside Ms. Mapp's drawer conclusively establish, or even inferentially establish, that she was, in fact, the Bettie Smalls who leased the Conduit Avenue premises in the absence of some other

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15. Counsel fixed this identification as that of Mrs. Smalls by mistaken repeated reference to this misidentification in her brief below pp. 33, 36.

16. Neither defendant took the witness stand at the second trial. At the first trial, although Ms. Mapp testified, she was asked no questions about Mrs. Smalls nor the payment of rent on the North Conduit premises. She did say she had never been in Apartment 2R (1T2682-2685). The superintendent of the building testified that he had never seen her in the building (2T974).

proof.[17]

Although the record is replete with the testimony of four police officers describing the comings and goings of the co-petitioners during January and February, 1970, during which period the officers had co-petitioners under surveillance, little or nothing of an incriminating sort emerges. Thus the record is bare of any evidence connecting Dollree Mapp to the crime (class A felony) of illegal possession of narcotics.

Judge Learned Hand has defined "possession" as used in a narcotics statute as:

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17. It is, of course, petitioner's contention that the introduction in evidence of rent receipts found in Ms. Mapp's bedroom drawer pursuant to an improper and unconstitutionally issued search warrant was error (see Point II infra). These rent receipts made out, not to Ms. Mapp, but to Mrs. Bettie Smalls, were the only evidence of any tangible kind connecting Ms. Mapp to the Conduit Avenue premises; a great deal was made of these receipts at the trial. Her counsel argued below in the District Court that, even if the search warrant were valid arguendo, the rent receipts should have been suppressed because they were not "heroin" or "other narcotic drugs" as particularly described in the search warrant. Marron v. United States, 275 U.S. 192 (1927) (Brief below pp. 21-30). Appellant Mapp does not press this narrow argument here in view of the reasoning in United States v. Thompson, 495 F.2d 165 (2 ~~Cir.~~ 2nd 1974) which this Court might adopt, cf. United States v. Scharfman, 448 F.2d 1352 (2 Cir. 1971); see United States v. James Henry Rollins a/k/a Lee Evans, ___F.2d ___ (2 Cir. September 15, 1975 (NYLJ Sept. 29, 1975 p. 1). The Thompson case however suggests another point of departure. There, rent receipts to the apartment where the narcotics were seized made out in the defendant's name were found, as were keys which fit the apartment in question as well as a lease issued to the defendant. No such incriminating items were found in the case at bar, underlining again the inadequacy of the evidence on which Ms. Mapp's conviction was premised.

> "either actual custody of the chattel, or at least that relation to the custodian that makes him unconditionally subject to the 'possessor's' demand for custody." (United States v. Santore, 29 F.2d 51 [dissent p. 70] [2 Cir. 1960])

To prove constructive possession the state must show that the defendant had dominion and control, or the right to exercise dominion and control over the narcotics, United States v. Bethea, 442 F.2d 790, 793 (CADC 1971); Garza v. United States, 385 F.2d 899, 901 (5 Cir. 1967); Arellanes v. United States, 302 F.2d 603, 606 (9 Cir. 1962); United States v. Holland, 445 F.2d 701, 703 (CADC 1971). A person who merely pays the rent for someone else does not exert that kind of custodial dominion over leased premises. See Annotation 91 A.L.R.2d 810 et seq. "Constructive possession" has been defined as "the legal right to possession without actual possession". Baehr v. Penn-O-Tex Oil Corp., 104 N.W.2d 661, 664, 258 Minn. 533 (Sup.Ct. Minn. 1960). Again, a person who merely pays the rent for another, in the absence of other evidence, has no right of control or occupancy, or, in short, possession of that property.[18]

The probabilities in the case at bar under all the facts

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18. In this regard, although Ms. Mapp's keys were seized in the search (2T557) (to be challenged as illegal infra), no keys to apartment 2R were found in her immediate possession, on her person or in her apartment on Nashville Boulevard. Although fingerprints were analyzed on the contraband items taken from the apartment, no prints of petitioner Mapp were found on any of the items (A343), thus further challenging the inferences sought to be drawn from the facts by the prosecution.

simply do not justify the inference being drawn that Ms. Mapp had possession or aided and abetted anyone's (Lyons) possession of the heroin some miles away at the time of her arrest. Cf. People v. Patello, 41 A.D.2d 954 (2nd Dept. 1973); United States v. Stephenson, 474 F.2d 1353, 1354 (5 Cir. 1973) (conviction reversed on insufficiency of evidence of possession even though fingerprints of defendant on envelopes containing heroin were found).

Moreover where inferences or presumptions are the basis for conclusions leading to criminal conviction, there must be a rational connection between the facts proved and those inferred therefrom. Tot v. United States, 319 U.S. 463 (1943); Leary v. United States, 395 U.S. 6, 33 (1969). In the case at bar the only fact proven, if one accepts the dubious identification testimony, was the payment of rent -- not every month but for some months. See United States v. Keller, 512 F.2d 182 (3 Cir. 1975.)

From this, and nothing more, the finder of fact must infer, first the right to occupy Apartment 2R and then, from that inference, infer the possession of narcotics found in Apartment 2R on February 18, 1970 in the absence of Ms. Mapp who was in premises on Nashville Boulevard, her own dwelling place. The Court of Appeals for the District of Columbia has recently had occasion to consider the inference of constructive possession as established by rent receipts made out to the person charged with possession of narcotics in United States v. Watkins,

519 F.2d 294 (CADC 1975). In Watkins the court reversed a conviction on the grounds of the insufficiency of the evidence holding that the rent receipts, themselves, were inadmissible hearsay evidence. In the case at bar the rent receipts were not hearsay because of the testimony of two witnesses who said they signed them. They nonetheless did not prove Ms. Mapp's possession or right to occupy Mrs. Smalls's apartment.

In addition, the finder of fact is here presented with facts inconsistent with the version urged by the state: although keys were found in Ms. Mapp's possession they did not fit the North Conduit premises and her fingerprints were not on any of the contraband (see note 18 supra).

In Turner v. United States, 396 U.S. 398 (1970) the Supreme Court held that a conviction based on a mere presumption cannot be deemed a conviction on sufficient evidence.

> "When the evidence of a crime is insufficient as a matter of law as the evidence here plainly is, a reversal of the conviction is in accord with the historic principle that independent trial judges and independent appellate judges have a most important place under our constitutional plan since they have the power to set aside convictions." Toth v. Quarles, 350 U.S. 11, 14 (1965), quoted by Justice Black in Turner (dissent) 396 U.S. at 429.

Said Justice Harlan, concurring in California v. Green, 399 U.S. 149, 186 (1970):

> "Due process does not permit a conviction based on no evidence Thompson v. Louisville 362 U.S. 199 (1960); Nixon v. Herndon 273 U.S. 536 (1927), or on evidence so unreliable and untrustworthy that it may be said that the accused had been tried by a Kangaroo

> Court. Cf. In re Oliver [333 U.S. 257], Turner v. Louisiana 379 U.S. 466."

To the same effect is Johnson v. Florida, 391 U.S. 596 (1968); Garner v. Louisiana, 368 U.S. 157 (1961); Vachon v. New Hampshire, 414 U.S. 478 (1974). Said the Court in Thompson v. Louisville, 362 U.S. 199, 206 (1960) referred to above:

> ". . . we find no evidence whatsoever in the record to support these convictions. Just as conviction upon a charge not made would be a sheer denial of due process, so is it a violation of due process to convict and punish a man without evidence of his guilt."

Moreover

> "one who neither engages in the conduct specifically prohibited, nor aids and abets it, does not violate the section which prohibits it." Bozza v. United States, 330 U.S. 160, 163 (1947).

This Court has recently reversed a federal criminal narcotics conviction for insufficiency of the evidence as a matter of law. United States v. Johnson, 513 F.2d 819 (2 Cir. 1975). Cf. United States v. Liguori, 438 F.2d 663 (2 Cir. 1971).

The United States Supreme Court has had occasion to discuss the obligation of an appellate court to make its own independent analysis of the evidence when a constitutional right such as due process of law is asserted. In Codispoti v. Pennsylvania, 418 U.S. 506, 517n (1974) the Court said:

> "When constitutional rights turn on the resolution of a factual dispute, we are duty-bound to make an independent examination of the evidence in the record."

It is here submitted that any independent examination establishes that there was no evidence connecting Ms. Mapp to the crime of possession of narcotics in the case at bar.

POINT II

NO PROBABLE CAUSE FOR THE SEARCH WARRANT REQUIRED SUPPRESSION OF ALL EVIDENCE OBTAINED AS A RESULT OF ITS EXECUTION.

It was established by the testimony of Detective Bergerson at the suppression hearing which preceded the first trial of co-petitioners that he could recall no other information given to the magistrate (Judge Joan O'Neill) than that appearing in the affidavit (see p. 5 supra) (A9).

A reviewing court may consider only the information brought to the magistrate's attention in that affidavit. Giordenello v. United States, 357 U.S. 480, 486 (1958); Aguilar v. Texas, 378 U.S. 108 (1964).

Measured against the standard mandated by the United States Supreme Court in a long line of cases, the affidavit in the instant case does not pass constitutional muster as grounds under the Fourth Amendment for the issuance of a search warrant.

Although an affidavit supporting a search warrant may be based on hearsay, it must inform the magistrate of the underlying circumstances relied on by the person supplying the information -- and the information must be shown to be creditable, Aguilar, supra, p. 114. Moreover, the role of the magistrate in determining whether or not to issue the warrant is to be "neutral and detached . . . and not serve merely as a rubber stamp for the police." Aguilar p. 111. Aguilar at p. 112 quotes Nathanson v. United States, 290 U.S. 41, 47 (1933):

> "Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough."

Further gloss on the strict requirements of the Fourth Amendment that a search warrant must not issue on mere suspicion is provided in Spinelli v. United States, 393 U.S. 410 (1969) -- a case involving affidavit allegations similar to those in the case at bar. In Spinelli, the informer's tip was not held to be sufficient even though corroborated by other allegations.[19]

In the instant case the informer was defined as one "not proven reliable in the past" -- in Spinelli there was no reason stated to support the conclusion that the informer was reliable -- nor was corroboration of certain limited aspects of the informer's report sufficient to validate the affidavit. Neither the informer nor the deponent alleged that he had been inside the premises to be searched nor had he seen either of the co-petitioners in possession of drugs (a John Doe allegation,

---

19. This Court has recently had occasion to put gloss on Spinelli and Aguilar in United States v. Burke, 517 F.2d 377, 380 (2 Cir. 1975):

> "There has been a growing recognition that the languate in Aguilar and Spinelli was addressed to the particular problem of professional informers and should not be applied in wooden fashion to cases where the information comes from an alleged victim or witness to a crime."

In the case at bar there is no contention or facts from which an inference can be drawn that the informer was either a victim or a witness to the crime with which petitioner was charged.

par. F, alleges Lyons sold a quantity of heroin to John Doe without connecting the transaction to either address or to Ms. Mapp). The source of the information alleged is not revealed.

In Spinelli as here the Court said (p. 416):

> "The [informer's] tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a book making operation. We are not told how the FBI's source received his information -- it is not alleged that the informant personally observed Spinelli at work or that he ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable. Cf. Jaben v. United States 381 U.S. 214 (1965). In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."

Neither the informer nor the personal observation of Detective Bergerson directly connect Ms. Mapp with any observed narcotic operation. The observations relied on are neither "personal" nor "recent". See United States v. Harris, 403 U.S. 573, 579 (1971). Even the allegations in paragraph E of the affidavit (supra pp.6,7) fail to connect Ms. Mapp definitely with any narcotic transaction since it is not stated how the unreliable informer established that the telephone voice was that of Ms. Mapp nor how Detective Sylvan Toppel informed Bergerson or knew the facts alleged. Moreover, the reported conversation took place more than three months before the application for the warrant.

Said the United States Supreme Court in Sgro v. United States, 287 U.S. 206, 210 (1932):

> "It is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time."

In Durham v. United States, 403 F.2d 190, 194 (9 Cir. 1968) the Court explained:

> "A showing to the effect that the property to be seized was at the place to be searched a substantial time before the application is made does not justify the issuance of a search warrant, for the reason that during the intervening period the property may have been moved away. The facts must show that the property to be seized was known to be at the place to be searched so recently as to justify the belief that the property is still there at the time of the issuance of the search warrant."

In Harris above, the informer had purchased the contraband within two weeks of the making of the affidavit. This Court has had occasion to reverse a conviction (and remand the case to the District Court to ascertain whether or not the magistrate had any other information than was presented in the affidavit) in United States ex rel. Rogers v. Warden, 381 F.2d 209, 215 (2 Cir. 1967). There, now Chief Judge Kaufman referred to the "landmark decision in Mapp v. Ohio[20] 367 U.S. 643 ... (1961)

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20. And indeed it is no coincidence, it is here submitted, that this petitioner, that very same Dollree Mapp of Mapp v. Ohio, is again seeking justice from a higher court against the "state's invasion of her privacy" and the improper and unconstitutional invocation of "shortcut methods in law enforcement."

holding that the Fourth Amendment's proscriptions apply to the State through the Fourteenth Amendment. . ." See United States ex rel. Laurence Metze v. New York, 303 F.Supp. 1359 (SDNY 1969); Riggan v. Virginia, 384 U.S. 152 (1966); United States v. Menser, 360 F.2d 199 (2 Cir. 1966); cf. United States v. Viggiano, 433 F.2d 716 (2 Cir. 1970) cert. den. 401 U.S. 938 (2 Cir. 1971) (informer's report augmented by independent observation of FBI corroborating informer's observation).

POINT III

MATERIAL INCONSISTENCIES BETWEEN THE ALLEGATIONS IN THE AFFIDAVIT FOR THE SEARCH WARRANT AND THE DEPONENT'S SWORN TESTIMONY AT THE SUPPRESSION HEARING AND TRIAL MANDATE THIS COURT'S SUPPRESSION OF THE SEARCH WARRANT AND REVERSAL OF MS. MAPP'S CONVICTION.

A number of material inconsistencies between the allegations set forth in the affidavit for the search warrant and the testimony at trial mandate reversal of petitioner Mapp's conviction.

These inconsistencies described in detail supra pp. 8-10 are material and serious. They include a statement intended to be believed by the magistrate that the North Conduit premises were being used for the "processing, cutting and packaging" of heroin at a time when the premises could not be and were not occupied by reason of an elevator strike (2T747, A361). They include information on the telephone to the deponent on

February 5, 1970 concerning bagging up (presumably the magistrate was supposed to believe heroin was meant) on February 8, 1970. At the hearing Detective Bergerson could not remember any such telephone call from the informer. Similarly he could not remember speaking to the informer at all between February 4 and February 8, 1970 although in his affidavit Bergerson swore that he learned about the February 5, 1970 conversation from the informer. A glaring inconsistency appears in the difference between Detective Bergerson's testimony at the hearing to suppress in September 1970 and his testimony at the trial below with reference to his knowledge of or acquaintance with the informer, viz.:

> [Bergerson--at the hearing]
> "Q. And you know this informant?
>
> "A. Yes, I do.
>
> "Q. How long had you known him prior to that time Oct. 6, 1969?
>
> "A. Oh, approximately five or six months - five or six months." (A20)
>
> [Bergerson--at the trial]
> "Q. Had you met the informant before Oct. 6, 1969?
>
> "A. No." (2T65)

This Court has suggested in United States v. Gonzales, 488 F.2d 833, 837, 838 (2 Cir. 1973) that this Circuit would adopt the rule that material and knowing misstatements in an affidavit supporting a warrant would invalidate the warrant -- a negligent misstatement would upset a warrant only if the

misstatement was material. See United States v. Bozza, 365 F.2d 206, 223-224 (2 Cir. 1966); United States v. Pond and Fanelli, 382 F.Supp. 556, 560 (SDNY 1974) affd. ___F.2d___ (2 Cir. August 28, 1975). Cf. United States ex rel. Cubicutti v. Vincent, 383 F.Supp. 662 (SDNY 1974); Ruggendorf v. United States, 376 U.S. 528, 531, 532 (1964). The Gonzales court cited 84 Harvard Law Review 825 (1971) to demonstrate that there is a conflict in the circuits on the issue of whether or not a search warrant can be invalidated by misstatements, material or not or negligently made or not. The affirmance by this Court of Pond this year supports the holding of this Circuit in Gonzalez that "a misrepresentation which is either intentional or material if contained in a search warrant affidavit requires reversal." Cf. United States v. Seijo, 514 F.2d 1357 (2 Cir. 1975).

It is submitted that there is enough before this Court at this time at least to warrant a hearing in the District Court on this issue.

See United States v. Perry, 380 F.2d 356, 358 (2 Cir. 1967) cert. den. 389 U.S. 943; United States v. Carmichael, 489 F.2d 983 (7 Cir. 1973); United States v. Sulton, 463 F.2d 1066, 1070 (2 Cir. 1972); United States v. Hunt, 496 F.2d 888, 894 (5 Cir. 1974)(false statements even if not material can "eviscerate the existence of probable cause"); United States v. Thomas, 489 F.2d 664 (5 Cir. 1973).

POINT IV

UNDER ALL THE CIRCUMSTANCES OF THIS CASE, PETITIONER MAPP WAS DEPRIVED OF DUE PROCESS OF LAW BY THE REFUSAL OF THE STATE COURT TO DIVULGE THE IDENTITY OF THE INFORMER ON WHOSE INFORMATION THE POLICE SOUGHT THE SEARCH WARRANT OF THE NASHVILLE BOULEVARD AND CONDUIT AVENUE PREMISES.

As discussed in Points I, II and III supra, there was an aura of unfairness about the whole proceeding against Ms. Mapp, based as it was, on insufficient evidence (really an absence of evidence) of her guilt of the indicted charge (Point I). Moreover it is contended that the search warrant was based on insufficient reliable information to warrant its issuance in the first place (Point II). And when the basis for the search warrant was challenged and a hearing was held, the testimony of the police officer applying to the magistrate for the warrant revealed material variances between his sworn affidavit allegations and his testimony at the hearing (and his trial testimony as well) (Point III).

Under these facts justice required the disclosure of the identity and the production of the informer as was requested by counsel prior to the first trial in 1970 (A21, A98). The State Court denied counsel's motion for disclosure. Roviero v. United States, 353 U.S. 53 (1957) establishes the principle that an informer's identity must be disclosed if fundamental fairness requires it. Despite the general rule that the government

has a privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with the enforcement of that law, the privilege must give way

> "where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause . . . ." (pp. 60, 61)

The case at bar does not involve the informer as a "participant" in the crime as in Roviero or even as a "go-between". The informer here played the role of "tipster", not one usually subject to the requirement of disclosure.[21]

Disclosure of the informer, however, became necessary here if not on initial application, on the basis of the combination of facts revealed at the pretrial suppression hearing and the factual developments at trial. See supra pp.8-10,27,28.

It is conceded that disclosure of the identity of an informer is not always required under the Constitution, McCray v. Illinois, 386 U.S. 300 (1967) but in certain particular situations it is necessary. See United States v. Robinson, 325 F.2d 391 (2 Cir. 1963); United States ex rel Coffey v. Fay, 344 F.2d 625 (2 Cir. 1965); United States v. Commissiong, 429 F.2d 834 (2 Cir. 1970). Said Judge Friendly for this Court in

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21. See "The Informer's Identity at Trial", The Legal Digest, February, 1975, pp. 21-25.

Commissiong (p. 838):

> "even in the case of a warrantless arrest, disclosure would be required only when the informer's story constitutes the essence or core or main bulk of the evidence brought forth which would otherwise establish probable cause."

In the case at bar, the officer securing the warrant relied (in all instances connecting petitioner to narcotics in any way) on the informer's alleged knowledge.

Recent decisions in the Ninth Circuit have developed various procedures for achieving the proper balance between secrecy and disclosure. See United States v. Anderson, 509 F.2d 724 (9 Cir. 1975) (in camera hearing with defense counsel present); United States v. Tutwiler, 505 F.2d 758 (9 Cir. 1974).

This Court has reconsidered its prior decision denying disclosure of an informer's identity to require such disclosure, and ruled that such identity either must be disclosed or in the alternative the District Court must dismiss the indictment in the interests of fairness. See United States of America v. Fernandez, 506 F.2d 1200 (2 Cir. 1974).

No opportunity of any kind was given to petitioner in the trial court to ascertain who the informer was or if, in fact, one really existed. Under these circumstances there was a denial of due process of law. The identity of the informer should be disclosed and a new hearing on suppression held in the District Court, or in the alternative the petitioner should be ordered released.

CONCLUSION

The judgment of the court below should be reversed and the writ of habeas corpus granted.

Respectfully submitted,

ELEANOR JACKSON PIEL
Attorney for Petitioner-
Appellant Dollree Mapp

October 21, 1975

APPENDIX

PAGINATION AS IN ORIGINAL COPY

RELEVANT DOCKET ENTRIES

417 U.S.A. ex rel. NANCY ROSNER on behalf of DOLLREE MAPP

DATE	NR.	PROCEEDINGS
3-19-75		PETITION FILED FOR A WRIT OF HABEAS CORPUS. (1)
3-19-75		MEMORANDUM OF FACTS AND LAW FILED. (2)
4-24-75		BY BRUCHHAUSEN, J. MEMORANDUM and ORDER FILED. ORDERED that the PETITION be and it is hereby DISMISSED. (See Memo.,etc.) (3) (Copy sent out of Judge Bruchhausen's chambers, etc.)
4-25-75		JUDGMENT FILED. ORDERED and ADJUDGED that the petitioners take nothing of the respondents and that the petition is DISMISSED. (4)
5-27 75		NOTICE OF APPEAL FILED. (5)
5-27-75		Copy of Notice of Appeal was on this day mailed to Clerk, U.S.C.A.
5-27-75		Copy of Notice of Appeal was on this day mailed to Hon. Louis Lefkowitz, Atty., Gen., State of N.Y., etc.
6-2-75		NOTICE OF MOTION FILED for a reconsideration of the issues herein, etc. (returnable at a time convenient to the Court) or in the alternative, for a certificate of probable cause, etc. (6)
6-6-75		Affidavit of Ralph L. McMurry filed in opposition to petitioners' motion for reconsideration or in the alternative a certificate of probable cause. (7)
6-6-75		BY BRUCHHAUSEN, J. Applications DENIED and it is so ORDERED. (8) Copies were forwarded to the attorneys for the parties, by the secretary to Bruchhausen, J. (See Memorandum and Order)

A TRUE COPY
ATTEST
DATED August 13 1975
LEWIS ORGEL
CLERK
BY Marilyn Gill
DEPUTY CLERK

NOTICE OF APPEAL

MAY 27 4 23 PM '75
CLERK
U.S. DISTRICT COURT
E. DISTRICT
OF N.Y. YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES ex rel. Nancy Rosner, on behalf of DOLLREE MAPP and ALAN LYONS,

Petitioners,

-against-

WARDEN, New York State Correctional Institution for Women, Bedford Hills, New York; and WARDEN, Great Meadow Correctional Facility, Comstock, New York,

Respondents.

NOTICE OF APPEAL

75 C 417

S I R:

PLEASE TAKE NOTICE, that Dollree Mapp and Alan Lyons, the petitioners above-named, hereby appeal to the Court of Appeals for the Second Circuit from the order dismissinq their petition for a writ of habeas corpus entered in this action on the 24th day of April, 1975.

4178
Pd. pt. [illegible]

May 27th, 1975

Yours, etc.,

Nancy Rosner

NANCY ROSNER
Attorney for Petitioners
401 Broadway, Room 1412
New York, N.Y. 10013
(212) 925-8844

TO: HON. Louis Lefkowitz,
Attorney General
State of New York
World Trade Center
New York, New York

JUDGMENT APPEALED FROM

UNITED STATES ex rel. Nancy Rosner, on behalf of DOLLREE MAPP and ALAN LYONS,

Petitioners,

-against-

WARDEN, New York State Correctional Institution for Women, Bedford Hills, New York; and WARDEN, Great Meadow Correctional Facility, Comstock, New York,

Respondents.

JUDGMENT

75-C-417

A memorandum and order of the Honorable Walter Bruchhausen, Senior United States District Judge, having been filed on April 24, 1975, dismissing the petition for a writ of habeas corpus, it is

ORDERED and ADJUDGED that the petitioners take nothing of the respondents and that the petition is dismissed.

Dated: Brooklyn, N.Y.
April 25, 1975

Lewis Orgel
Clerk

By Thomas Bastian
Chief Deputy

PETITION FOR A WRIT OF HABEAS CORPUS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES ex rel. Nancy Rosner on behalf of DOLLREE MAPP and ALAN LYONS,

Petitioners,

v.

PETITION

WARDEN, New York State Correctional Institution for Women, Bedford Hills, New York; and WARDEN, Great Meadow Correctional Facility, Comstock, New York,

Respondents.

----------X

TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK:

1. Your relator is the attorney for Dollree Mapp and Alan Lyons, petitioners herein, and has been authorized by them to make this petition pursuant to 28 U.S.C. §2254 for a writ of habeas corpus on their behalf.

2. On March 24, 1970 the petitioners were indicted in the Supreme Court of the State of New York, County of Queens, for one count of criminal possession of a dangerous drug in the first degree. N.Y. Penal Law §220.23. After a first conviction was reversed on appeal, People v. Mapp, 39 A.D.2d 968, 333 N.Y.S.2d 539 (2d Dept. 1972), the petitioners were tried again in the Queens County Supreme Court (Balbach, J., and a jury), and were convicted as charged on February 22, 1973. On May 2, 1973

petitioners were each sentenced to a term of 20 years to life imprisonment.

3. On appeal the judgments of conviction were affirmed by the Appellate Division, Second Department, without opinion. People v. Mapp, ___ A.D.2d ___ (2d Dept., Aug. 5, 1974). Leave to appeal to the Court of Appeals of the State of New York was denied on September 26, 1974 by Judge Harold A. Stevens. A copy of the certificate denying leave is attached to these papers.

4. The petitioner Dollree Mapp is presently detained in the custody of the New York State prison authorities at the Correctional Institution for Women in Bedford Hills, New York, while petitioner Alan Lyons is incarcerated in the Great Meadow Correctional Facility, Comstock, New York. Petitioners' detention is pursuant to the judgments of conviction entered in this case on May 2, 1973.

5. No previous application for the relief sought herein has been made.

6. As more fully set forth in the accompanying memorandum of facts and law, which is annexed to this petition and made a part hereof as if fully set forth herein, the detention of the petitioners is illegal and in violation of the laws and Constitution of the United States for the following reasons:

(i) The search warrant authorizing the search of petitioners' premises was illegal since the affidavits supporting the warrants contained insufficient information upon which a finding of probable cause could be made.

(ii) Even if probable cause existed for the North Conduit Avenue apartment, there was no probable cause for a search of the Nashville Boulevard premises. The warrant, addressed to both premises, was therefore overbroad and invalid in its entirety.

(iii) The seizure of rent receipts from the home of petitioner Mapp was unlawful since the seizure exceeded the scope of the warrant.

(iv) Disclosure of the informer's identity was required in this case and the refusal of the trial court to order production of the informant, particularly following an inference of the use of perjurious statements to support the issuance of the warrant, violated the rights of the petitioners.

(v) The identification testimony of two prosecution witnesses should have been excluded since it derived from procedures impermissibly suggestive and in violation of the Due Process Clause of the United States Constitution.

WHEREFORE, relator prays that an order be entered granting the writ of habeas corpus pursuant to 28 U.S.C. §2254 and further discharging the petitioners from custody, and that the Court grant any such other and further relief as to this Court may seem just and proper.

_____

NANCY ROSNER, Relator

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

NANCY ROSNER, being duly sworn, deposes and says that deponent is the attorney for petitioners herein; that she has read the foregoing petition and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes them to be true. The grounds for deponent's belief are as follows: documents and papers in the file in this case and continuing communication between deponent and petitioners. Deponent further states that the reason this verficiation is made by deponent and not by petitioners is that the petitioners are incarcerated without the County of New York.

_____

Sworn to before me this

26th day of February, 1975.

MEMORANDUM AND ORDER DATED APRIL 24, 1975,
DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

UNITED STATES ex rel. Nancy Rosner, on behalf of DOLIREE MAPP and ALAN LYONS,

Petitioners,

-against- : No. 75 C 417

WARDEN, New York State Correctional Institution for Women, Bedford Hills, New York; and WARDEN, Great Meadow Correctional Facility, Comstock, New York, : April 24, 1975

Respondents.

- x

MEMORANDUM and ORDER

BRUCHHAUSEN, D. J.

On March 29, 1975, the petitioners filed an application for a Writ of Habeas Corpus, in this court.

The indictment, No. 717/1970, was filed on March 24, 1970 in the Supreme Court of the State of New York, County of Queens.

On May 2, 1973, the petitioners were convicted

for possession of more than sixteen ounces of heroin. Each of them was sentenced to a term of twenty years to life.

On July 29, 1974, the Appellate Division, Second Department, affirmed the judgment of conviction, without opinion. See 358 N.Y.S.2d 675.

On September 20, 1974, the Court of Appeals of this State denied leave to appeal.

The petitioners allege five points in support of their application, viz:

Point 1. There was insufficient probable cause to support the issuance of a search warrant;

Point 2. The warrant was over broad;

Point 3. The seizure of the rent receipt from the home of appellant, Mapp, was unlawful since the seizure exceeded the scope of the warrant;

Point 4. The disclosure of the informants identity was required in this case;

Point 5. The identification testimony of the witnesses Weiss and Martin should have been excluded.

On file in this court is a copy of the record submitted to the Appellate Division, Second Department,

on the appeal thereto, containing transcripts of the pre-trial hearings (See pages A-105 to A-396 of the said record) and the trial of the petitioners. The said record includes the transcript of the testimony taken before Justice O'Connor, in the Supreme Court, Queens County, Criminal Term, upon the motion to controvert the search warrant and to suppress the evidence seized thereunder. A number of witnesses testified. In his memorandum and order, dated November 18, 1970, Justice O'Connor stated, in part:

> "I, therefore, find that there was a sufficient showing of fact in the affidavit (Detective Bergersen submitted in support of the search warrant) to have warranted the court below in concluding that there was probable cause to believe that narcotics were being stored and sold in the described premises. ***
>
> "The defendants contend that the disclosure of the identity of the informant is here required. The officer's observations were sufficient, quite apart from the informant's communication, to establish that probable cause existed to support the issuance of a warrant. Since that is so, the People were not under the necessity of disclosing the identity of the informant.
>
> *****
>
> "The defendants have not met the burden placed upon them on this motion to controvert the warrant. (See United States v. Napela, 2nd Cir. 28 F.2d 898).
>
> "The motion to controvert the search warrant and to suppress the evidence seized upon the execution of the warrant is denied."

In a memorandum and order, dated November 30, 1972, Justice George J. Balbach, stated, in part:

> 'After hearing testimony in support of an application to suppress the identification of defendant Dollree Mapp as a person who paid rent under another name and to suppress rent receipts allegedly seized as non-contraband evidence in violation of the directions of a search warrant, the validity of which warrant was heretofore sustained by Mr. Justice Frank D. O'Connor, the Court finds as follows:
>
> *****
>
> "Applying such reasoning, this Court can find no circumstances why the police should have been obliged to obtain a further warrant to particularize the rent receipts. ** The application to suppress the rent receipts is denied."

Each of the said five points, now urged by the petitioners, were considered at the State Court hearings, conducted by Justices O'Connor and Balbach, and ruled in favor of the respondents and against the petitioners.

In United States ex rel. Gilliard v. LaVallee, 376 F. Supp. 205, 209 and 210, the Court stated:

> "It is well settled that where the State Court has conducted a full and fair evidentiary hearing with express findings of fact, the district court may 'and ordinarily should, accept the facts as found in the hearing'. Townsend v. Sain, 372 U.S. 293, 318. This principle was codified in 28 U.S.C. §2254(d)."

Upon due deliberation, it is ordered that the petition be and it is hereby dismissed.

A copy hereof will be forwarded to the attorney for the petitioners and to the Attorney General of this State.

Walter Bruchhausen
Senior U. S. D. J.

MEMORANDUM AND ORDER DATED JUNE 6, 1975
DENYING MOTION FOR RECONSIDERATION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

UNITED STATES ex rel. Nancy Rosner, on behalf of DOLLREE MAPP and ALAN LYONS,

Petitioners,

-against-

WARDEN, New York State Correctional Institution for Women, Bedford Hills, New York, and WARDEN, Great Meadow Correctional Facility, Comstock, New York,

Respondents.

No. 75 C 417

June 6, 1975

- x

MEMORANDUM and ORDER

BRUCHHAUSEN, D. J.

The petitioners, move for a reconsideration, resulting in an order of this Court, dated April 24, 1975, dismissing the petition, or, in the alternative, for a certificate of probable cause.

The moving papers contain no new matter, not previously considered on the original motion, and, therefore, reargument must be denied.

This Court carefully considered the State Court

records and ruled that the proceedings conducted therein were fair and adequate. The petitioners are not entitled to a de novo determination, and this Court need only refer to its original order, providing in part:

> "It is well settled that where the State Court has conducted a full and fair evidentiary hearing with express findings of fact, the district court may 'and ordinarily should, accept the facts as found in the hearing'. Townsend v. Sain, 372 U.S. 293, 318. This principle was codified in 28 U.S.C. §2254(d)."

The applications, therefore, are denied and it is so ordered.

Copies hereof will be forwarded to the attorneys for the parties.

/s/ WALTER BRUCHHAUSEN

Senior U. S. D. J.

2 Copies Received

Date October 22, 1975

From Hon. Louis J. Lefkowitz

By Arlene J. Silverman